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IN THE

Supreme Court of the United States

October Term, 1959

Nos. 462

BERNARD J. LEE,

Petitioner.

vs.

JENKINS BROTHERS, *et al.*,

Respondents.

BERNARD J. LEE,

Petitioner,

vs.

FARNHAM YARDLEY,

Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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II. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S CLAIM AGAINST YARDLEY IS BARRED BY THE SURETYSHIP PROVISIONS OF THE STATUTE OF FRAUDS.

III. PETITIONER ADDUCED NO EVIDENCE ON WHICH THE JURY COULD HAVE PROPERLY RETURNED A VERDICT FOR PETITIONER SINCE PETITIONER HAD ACTUALLY RECEIVED EVERYTHING TO WHICH BY HIS OWN TESTIMONY HE WAS ENTITLED BY WAY OF PENSION FROM JENKINS BROS.

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OPINIONS BELOW

The opinion of the District Court for the District of Connecticut (Hon. J. Edward Lumbard, C. J., sitting by designation) is reported at 156 F. Supp. 858.

The opinion of the Court of Appeals for the Second Circuit is reported at 268 F. 2d 357. It also constitutes Appendix A to the petition.

JURISDICTION

The jurisdictional requisites (diversity of citizenship) are adequately set forth in the petition.

QUESTION PRESENTED

Where petitioner applied for employment in 1920 to the president of a corporation in Connecticut, and over 30 years later claimed that the president (now dead) had orally promised in 1920 that if petitioner joined the corporation he would be paid a pension 30 years later regardless of what happened in the meantime and that if the corporation did not pay it he, the president, would pay it himself, and where petitioner later actually received from the corporation everything to which on his own testimony he was entitled by way of pension, did not the Court of Appeals properly hold that petitioner's evidence was not sufficient to take petitioner's case to the jury?

STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

The provisions of Sec. 8293 of the 1949 Revision of the Connecticut General Statutes (the Statute of Frauds); Rule 41(b), F.R. Civ. P.; and Article VII of the United States Constitution are set forth in the petition at pp. 2-3.

STATEMENT OF THE CASE

In these consolidated actions the petitioner claims that in early 1920, respondent Farnham Yardley, then president and chairman of the board of respondent Jenkins Brothers (and now dead), made an oral promise to him in a hotel room in Bridgeport, Connecticut, in the presence of two other persons (both also now dead). The alleged promise was that if petitioner would enter the employ of Jenkins Brothers in June 1920, Jenkins Brothers would pay him a pension in the maximum amount of $1,500 a year when he reached the age of 60, in 1950, whether or not petitioner was still

in Jenkins Brothers' employ at age 60. In addition, petitioner claims that Yardley then and there orally personally guaranteed the payment of the pension.

The actions, tried to the jury, were dismissed by the district court pursuant to Rule 41(b) of the Federal Rules of Civil Procedure at the conclusion of the plaintiff's case, on the ground that upon the facts and the law plaintiff had shown no right to relief.

The district court's Memorandum of Decision gave the following reasons for the dismissal under Rule 41(b):

1 The alleged oral contracts violate the Connecticut Statute of Frauds, Gen. Stats. (Rev. of 1949) Sec. 8293.

2 Farnham Yardley had no implied or apparent authority to bind Jenkins Brothers to pay such a pension.

The Court of Appeals for the Second Circuit affirmed, by a divided court. The Court of Appeals held (unlike the trial court in both respects) (1) that there was here present a jury issue of the apparent authority of Farnham Yardley orally to bind Jenkins Brothers to a pension payment, and (2) that plaintiff's alleged complete performance took the case out of the Statute of Frauds. Nonetheless, the Court of Appeals affirmed the dismissal, on the ground that the plaintiff's evidence was not sufficient to support a finding that president Yardley had promised plaintiff a pension that did any more than protect plaintiff's rights under the pension plan of plaintiff's former employer, Crane Co.

The evidence which the Court of Appeals found insufficient to take petitioner's case to the jury all came from the mouth of petitioner's only witness; himself.

Plaintiff's experience with Crane Company:

He was born on March 9, 1890 (Tr. 3).* In 1908 he was employed as an office boy by Crane Co. in Bridgeport, Conn. at $6 a week. He became business manager about 1916 or 1917 (Tr. 6). He worked at Crane Company until June 1, 1920 (Tr. 6). He cannot recall anything about what his salary with Crane was as business manager. (Tr. 39-40) and cannot recall his salary with Crane when he went with Jenkins (Tr. 42, 43).

The Crane Co. pension:

Crane Company had a pension for its employees around June 1, 1920. The pension was embodied in a little booklet (Tr. 7). He does not have a copy of the booklet (Tr. 7).

Under Crane's plan, male employees could be retired by the company at 60 or apply for retirement at 65 if they had 25 years of service (Tr. 36).

To the extent that he can recall, under the Crane pension plan, each employee would receive 2 per cent of their salary for each year of service if they were retired when they reached the age of 60 years; or, if they applied for retirement, when they reached the age of 65 years; and the maximum pension would amount to $1,500 per year (Tr. 8-9). Thus, up to June 1, 1920, plaintiff had thirteen years of service with Crane (Tr. 9).

The Jenkins purchase of the Crane plant:

Jenkins Brothers is a New Jersey corporation (See paragraph 1 of First Count of Complaint in Civil 5729; admitted in Answer). The Bridgeport plant of Crane

*Reference "(Tr.)" is to stenographic transcript of the trial minutes.

Co. was acquired on June 1, 1920. (See paragraph 2 of First Count of Complaint in Civil 5729; admitted in Answer).

Plaintiff testified in another suit against Jenkins Brothers in 1952 that "under the purchase contract that Jenkins had with Crane Company I was obliged to go to Jenkins Bros." (Tr. 48). His recollection at the instant trial was that he was merely "asked to go" over to Jenkins (Tr. 48).

Jenkins Brothers planned to incorporate the provisions of the Crane pension plan into the Jenkins plan of 1920 (Tr. 94).

Plaintiff's conversation with Yardley:

Subsequent to February 1920, and prior to June 1, 1920, plaintiff had a conversation with Farnham Yardley at the Stratfield Hotel suite of Mr. Barrington. Mr. Yardley, Mr. and Mrs. Barrington, and plaintiff were present (Tr. 13). Yardley was president, a stockholder, and a director of Jenkins Bros. (Tr. 15). Plaintiff cannot remember in what month this meeting occurred—"perhaps May, 1920"* (Tr. 53). Plaintiff had never met Yardley prior to the meeting and had never worked with him (Tr. 108).

Yardley told plaintiff that Jenkins had invested two million dollars in the plant at Bridgeport; that it was important that Jenkins was a going organization; that he realized that if they didn't have the staff and the equipment they could not make a success of the busi-

*The significance of this admission is that on April 15, 1920, New Jersey Laws of 1920, Chapter 175 became effective. Sec. 1 required board and stockholder approval of the pension plans of New Jersey corporations. (This statute is now Rev. Stat. Title 14, §§ 14:9-1 et seq.) Thus, Yardley's alleged pension contract with Lee in May, 1920 was clearly *ultra vires*.

ness; that Charles Barrington had told Yardley of plaintiff's experience in the plant; that he, Yardley, would very much like to have plaintiff join the organization (Tr. 22), and "As far as the pension that I had earned with Crane Company, he said the company would pay that pension if they didn't or, if anything came up, he would assume the liability himself; he would guarantee payment of the pension; and in consideration of that promise I agree to go to work for Jenkins Bros. on June 1, 1920 . . . The amount of the pension referred to by Mr. Yardley was a maximum of $1,500 a year and that would be paid me when I reached the age of 60 years; regardless of what happened in the meantime, if I were with the company or not, I would be given a credit for those 13 years of service with the maximum pension of $1,500 . . . At the age of 60" (Tr. 22-23).

Yardley said that Jenkins would assume the obligations of plaintiff's credit pension record with Crane and that if anything happened and they did not pay it, he would guarantee payment himself—if Jenkins did not pay plaintiff what he was entitled to under the Crane Company plan, he would guarantee that himself (Tr. 88).

Plaintiff's Employment by Jenkins:

Plaintiff left Crane around June 1, 1920 (Tr. 6) and was then thirty years old (Tr. 30). He does not recall at what salary he entered Jenkins' employ (Tr. 49).

He went to work as an assistant to the vice-president in charge of manufacturing and continued in that position until 1931 or 1932, when he was made vice-president and general manager of manufacturing. He was made a director (Tr. 24-25).

Jenkins' Service Pension Plan of June 1, 1920: A "Replica" of the Crane Plan:

After plaintiff entered the employ of Jenkins, Jenkins proceeded to adopt a Service Pension Plan dated June 1, 1920 (Tr. 63). This plan made provision for credit to Crane Co. employees who left Crane and came over to Jenkins on June 1, 1920, for their years of service with Crane. This included plaintiff (Tr. 65-66). Under the Jenkins 1920 plan, an employee 60 years of age became entitled to a pension if he had worked for 20 years (Tr. 68-73). The Jenkins Bros. 1920 plan was "a replica", a "copy" of the Crane plan in effect in 1920, because plaintiff himself had obtained the Crane pension plan book for Jenkins prior to June 1, 1920 so that Jenkins could institute its pension plan (Tr. 122-123).

Plaintiff's coverage by Jenkins 1920 Plan:

Plaintiff was covered by the Jenkins 1920 Service Pension Plan (Tr. 79).

After June, 1920 he had a contract with Jenkins "which was included in the terms of the Service Pension Plan of June 1, 1920"; and he had Yardley's "personal guarantee that [he] would get whatever he was entitled to under the Service Pension Plan" (Tr. 96-97).

Yardley had promised that plaintiff would get his pension in accordance with the terms of Jenkins 1920 Service Pension Plan, so that after June 1920 plaintiff had a contract with Jenkins which was "included in the terms of the 1920 plan." Also, he had Yardley's personal guarantee that he would see to it that plaintiff got whatever pension was provided for plaintiff in the 1920 plan (Tr. 129-131).

Plaintiff was entitled to 13 years of service under the Crane plan in 1920, and it was provided in the

Jenkins plan that the length of service should be computed from the date of entering Crane's employ (Tr. 90). Thus, when plaintiff went to Jenkins he *got* credit for the Crane service under the 1920 Jenkins pension plan (Tr. 123-124).

Therefore, plaintiff expected, if he reached the age of 60 and was then employed by Jenkins Bros. and had 20 or more years of continuous service with the company, to get a pension under the 1920 pension plan (Tr. 84).

The 1932 Jenkins Bros. Plan:

The Jenkins 1920 plan was modified in 1931 or 1932 and in 1932 the company put out a Contributory Service Pension Plan (Tr. 78). The 1932 plan recited that is superseded the 1920 Plan (Tr. 92).

Plaintiff's Transfer to Coverage by the 1932 plan:

Plaintiff applied to Metropolitan Life Insurance Co. to be covered by the 1932 plan (Tr. 91-92). He did come under, and was covered by, the 1932 plan (Tr. 94-95).

The 1932 plan made provision also for time spent by employees with Crane before they came over to Jenkins (Tr. 85) and so under the 1932 plan plaintiff was *again* given credit for his 13 years with Crane (Tr. 85-86).

Plaintiff's Discharge in 1945 at the Age of 55:

Plaintiff was discharged by Jenkins in 1945. He was then earning $25,000 a year. In 1945 he got a bonus of 10 per cent and $8,000 a year from a Jenkins affiliate (Tr. 25).

Plaintiff's Withdrawal of Everything He Was Entitled To Under The Jenkins 1932 Plan:

When plaintiff was discharged (by Jenkins in 1945) he withdrew all the funds he was entitled to under the 1932 plan (Tr. 92, 125).

Plaintiff's Disclaimer Under the 1920 and 1932 Plans:

The Jenkins 1920 plan provided for pensions for male employees who had reached the age of 60 years and the 1932 plan provided for pensions for Jenkins employees reaching the age of 65 (Tr. 95). Plaintiff had been discharged as an employee five years before he reached the age of 60, in 1950, and was not employed by Jenkins when he reached 65 (Tr. 95). He claims no rights under the 1920 Plan since he had not remained in Jenkin's employ until he reached the age of 60 (Tr. 99). In any case, he concedes the 1920 plan was voluntary and gratuitous (Tr. 99).

Plaintiff's Claims:

Plaintiff claimed at several points that "the amount of the pension referred to by Mr. Yardley was a maximum of $1,500 a year and that would be paid me when I reached the age of 60 years; regardless of what happended in the meantime, if I were with the company or not, I would be given a credit for those 13 years of service with the maximum pension of $1,500 [if I joined Jenkins]" (Tr. 23, 114, 122, 123).

Plaintiff claims that all he had to do was to enter Jenkins' employ in 1920, and even if he only stayed a week, he would be entitled to $1,500 a year for the rest of his life when he became 60, some 30 years later (Tr. 115).

ARGUMENT

I

THE DISTRICT COURT'S DECISION THAT AS A MATTER OF LAW THE CORPORATION'S PRESIDENT LACKED AUTHORITY TO COMMIT THE CORPORATION TO A LIFE-TIME PENSION HAS NOW BEEN PROVED TO HAVE BEEN CORRECT UNDER CONNECTICUT LAW.

The district court (Lumbard, C. J.) held as a matter of law that as president and chairman of the board of defendant Jenkins Brothers, Farnham Yardley did not have implied or apparent authority to enter into a valid contract with plaintiff in 1920 whereby the latter would be given pension rights as of 1950 merely in exchange for his agreement to enter the employ of Jenkins Brothers in 1920.

The Court of Appeals disagreed, and after a 14-page "survey" of the " 'general' law on the subject, on the assumption that, if a general rule can be found, Connecticut would follow it," (Pet., App. A, p. 26), the Court of Appeals finally concluded (id., p. 38) that under Connecticut law the issue of a president's apparent authority to make such a contract is a jury question of fact.

Actually, between the date of argument in the Court of Appeals (January 12, 1959) and the date of its decision (June 15, 1959), the Connecticut Superior Court held *otherwise*, on April 24, 1959, in *Esther Kolodney v. Kolodney Brothers, Inc.*, 21 Conn. Supp. 308 (Hartford County, File No. 110478, Phillips, J.). There plaintiff alleged an oral contract by defendant corporation through its president to pay her on the

death of her husband a life pension of $100 a week. The court held:

> "Even were the plaintiff's testimony to be accepted as face value, the defendant corporation would not be bound by Samuel Kolodney's arrangement. An officer of a corporation has no implied authority to bind it by a contract of employment or a pension for life. To justify a finding of such authority, there must be proof that there was definite authority, by by-law, action by the board of directors or otherwise, to make such a contract. *Heaman v. E. N. Rowell Co.*, 261 N. Y. 229; *General Paint Corporation v. Kramer*, 57 F. 2d 698; *Rennie v. Mutual Life Ins. Co.*, 176 F. 202; *Alabama Mills, Inc. v. Smith*, 237 Ala. 296; *Lee v. Jenkins Bros.*, 156 F. Sup. 858. The requisite authority could only be derived from action of the board of directors, acting as such. No evidence was produced to show any such delegation of authority by the directors to Samuel Kolodney. *Hurd v. Hotchkiss*, 72 Conn. 472."

The decision of the Connecticut Superior Court in *Kolodney* is of course binding on the federal court in the ascertainment of Connecticut law. *Robles v. Folsom*, 239 F. 2d 562, 564 (2d Cir. 1956), cert. denied, 353 U. S. 960 (1957); *John Hancock Mutual Life Ins. Co. v. Tarrance*, 244 F. 2d 86, 87 (6th Cir. 1957); *Arizona Western Ins. Co. v. L. L. Constantin & Co.*, 247 F. 2d 388, 391 (3rd Cir. 1957), cert. denied, 355 U. S. 905 (1957).

Thus Yardley could *not* effectively bind Jenkins Brothers to the pension contract claimed by petitioner, as a matter of Connecicut law.

II

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S CLAIM AGAINST YARDLEY IS BARRED BY THE SURETYSHIP PROVISIONS OF THE STATUTE OF FRAUDS.

The case against Farnham Yardley individually, Civil Action 6197, was tried on the claim that in 1920 Farnham Yardley promised plaintiff that he, Yardley, would "guarantee" payment by Jenkins of the pension which, on behalf of Jenkins Brothers, Yardley had allegedly offered to plaintiff (Tr. 22, 23, 34, 87-90, 128-131).

Under Connecticut law, an oral undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable, is within the Statute of Frauds. *Bartolotta v. Calvo*, 112 Conn. 385, 152 Atl. 306 (1930). *Sadd v. Siegelbaum*, 124 Conn. 383, 200 Atl. 346 (1938). *Fitzsimmons v. Int'l Ass'n of Machinists*, 125 Conn. 490, 7 A. 2d 448 (1939).

The Court of Appeals fully considered (Pet. App. A., pp. 39-44) the applicability of the Statute of Frauds to this action involving an alleged oral promise that a corporation would pay a pension 30 years later and that the corporate president himself would pay it if the corporation did not. The Court of Appeals concluded (id., p. 42) that the claim against the president, Farnham Yardley, is barred by the Statute whether or not Yardley had authority to bind Jenkins Brothers to such a pension agreement, since Yardley's alleged guarantee was a contract of suretyship (p. 39).

The decision of the Court of Appeals that petitioner's claim against the president is barred, is clearly

correct: Based upon petitioner's testimony, the jury could not reasonably have found other than that Yardley's alleged promise was to pay a pension to Lee in 1950 only if the corporation did not. As such, Yardley's alleged promise was a special one to "answer for the debt, default or miscarriage of another," within the Statutes of Frauds, Sec. 8293.

III

PETITIONER ADDUCED NO EVIDENCE ON WHICH THE JURY COULD HAVE PROPERLY RETURNED A VERDICT FOR PETITIONER SINCE PETITIONER HAD ACTUALLY RECEIVED EVERYTHING TO WHICH BY HIS OWN TESTIMONY HE WAS ENTITLED BY WAY OF PENSION FROM JENKINS BROTHERS.

The Court of Appeals affirmed the district court's decision on a ground—the insufficiency of plaintiff's evidence to go to the jury—not assigned by the district court. This was proper. *L. McBrine Co. v. Silverman*, 121 F. 2d 181 (9th Cir., 1941). A litigant may rely in the Court of Appeals upon grounds for supporting the judgment even though they were not passed on by the trial court. *Barie v. Superior Tanning Co.*, 182 F. 2d 724 (7th Cir. 1950); *American Surety Co. v. Brummel*, 184 F. 2d 935 (10th Cir. 1950); *Jaffke v. Dunham*, 352 U.S. 280 (1956).

Thus, the Court of Appeals was entitled to determine the critical question: not whether there was literally *any* evidence to support petitioner's claim but whether there was any upon which the jury could *properly* proceed to find a verdict for plaintiff. *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943); *Baltimore*

and Carolina Line v. Redman, 295 U.S. 654 (1935); *Pennsylvania R. R. v. Chamberlain*, 288 U.S. 333 (1933); *Wardman v. Washington Loan & Trust Co.* 90 F. 2d 429 (D. C. Cir. 1937). There is no rule requiring the trial court to submit a case to the jury where plaintiff has failed to produce evidence which would support a verdict. *Fleming v. Harrison*, 162 F. 2d 789 (8th Cir. 1947).

Here, giving full credit to plaintiff's evidence and indulging in every legitimate inference, there was *not* the required evidence of sufficient substantiality to support a verdict for the plaintiff. *Mateas v. Harvey*, 146 F. 2d 989 (9th Cir. 1945).

The best that plaintiff produced was a mere scintilla of evidence, not the substantial evidence required for submission of an issue to the jury. *Mateas v. Harvey, supra.*, p. 993. *Hawley v. Alaska Steamship Company*, 236 F. 2d 307 (9th Cir. 1956).

The evidence was insufficient to establish or to support any reasonable inference, either

(1) that the consideration to be exchanged for the alleged promise of a pension in 1950 was plaintiff's mere entry into the employ of Jenkins Brothers in 1920; or

(2) that Farnham Yardley was authorized to bind Jenkins Brothers in 1920 to a pension to begin in 1950; or

(3) that Yardley agreed on behalf of Jenkins Brothers to give plaintiff any pension other than the company's 1920 Service Pension Plan effective June 1, 1920.

The evidence presented by the plaintiff, if submitted to the jury, would have given them nothing but a choice

of probabilities as to what the outcome should be. It would have required the jury to reach a decision based, not upon substantial evidence, but upon conjecture as to what was actually required of plaintiff to earn his pension. *Commercial Standard Ins. Co. v. Gordon's Transports, Inc.*, 154 F. 2d 390 (6th Cir. 1946). Such speculation cannot be allowed to do duty for probative facts. *Galloway v. United States*, 319 U. S. 372 (1943).

Plaintiff's Own Testimony Negates His Right to Recover:

At various points throughout his testimony Lee reiterated that what Yardley actually told him was that he would get whatever pension rights he was entitled to *under the 1920 Service Pension Plan*, taking into consideration his years of service with Crane (Tr. 88, 96-97, 129-130, 130-131).

In fact, the Jenkins 1920 plan *did* give plaintiff credit for service with Crane Co., and so plaintiff *did* get credit for his 13 years with Crane. Of course, under the Crane plan as well as under the Jenkins plan, an employee had to be in the company's employ on reaching 60. This Lee failed to do.

When Lee testified that Yardley promised him simply that he would get whatever pension he was entitled to receive under the 1920 Service Pension Plan, the defendants were entitled to hold him to that testimony. This defeated his right to a verdict. *Canadian Pac. Ry. Co. v. Sullivan*, 126 F. 2d 433 (1st Cir. 1942), *cert. denied*, 316 U. S. 696 (1942).

Thus, plaintiff's own testimony directly negated his claim.

Where part of a plaintiff's testimony is against his own interest, that testimony is presumed to be true.

Where a party's own testimony, if true, would defeat his right to a jury verdict, and that testimony is not explained, a verdict may properly be directed against him. *Barnett v. Terminal R.R.*, 228 F. 2d 756 (8th Cir. 1956), *cert. denied*, 351 U. S. 953 (1956). Anno., *Right of a Party to Have Case Submitted to Jury When His Own Testimony Negatives His Right of Action or Defense*, 50 A. L. R. 979 (1927).

Where a party makes an admission, such an admission will be treated as less than conclusive only under extraordinary circumstances, where justice required it. *Iravani Mottaghi v. Barkey Importing Co.*, 244 F. 2d 238 (2d Cir. 1957), *cert. denied*, 354 U. S. 939 (1957). There are no such extraordinary circumstances here.

Plaintiff Received from Jenkins Brothers Everything To Which He Was Entitled by Way of Pension.

In any case, clearly, the pension to which Yardley referred was the one Jenkins Brothers actually concluded with the plaintiff in the 1920 Service Pension Plan.

The only reasonable construction which can be drawn from the evidence is that plaintiff was required to *work* for Jenkins Brothers until he reached retirement age, in accordance with what became the 1920 Service Pension Plan.

There can be no other fair construction than that Yardley and plaintiff were referring in their oral negotiations to the Jenkins 1920 plan, which was in turn modeled on the Crane plan. Plaintiff himself seeks to import into the oral agreement the "2% of annual earnings" feature of the Crane plan (see Tr. 23; Pet. p. 5), even though admittedly Yardley never mentioned these figures. This plan required plaintiff to render

service to Jenkins until he reached 60, not merely enter its employ for a few days in 1920!

Plaintiff's own testimony makes it clear that he and Yardley were merely engaging in preliminary negotiations, looking to the formal 1920 Service Pension Plan. These negotiations did not constitute a contract. *Citizens Committee v. Hampton*, 19 Conn. Supp. 375, 114 A. 2d 388 (1955). *Chiapparelli v. Baker, Kellogg & Co.*, 252 N. Y. 192, 169 N. E. 274 (1929). These preliminary negotiations merged into the written 1920 Service Pension Plan that became effective June 1, 1920. 17 C.J.S. *Contracts* § 381.

Plaintiff *claims* that the Jenkins 1920 plan was "additional coverage" over and above the oral arrangement (Tr. 79, 80). However this is merely his own self-serving conclusion—there is no evidence that Yardley ever actually promised anything "additional". After all, the intention of contracting parties is the *expressed* one, rather than the one in the parties' minds. *Ives v. City of Willimantic*, 121 Conn. 408, 185 Atl. 427 (1936). *RFC v. United Distillers Products Corp.*, 133 F. Supp. 468 (D. Conn. 1952), *aff'd* 204 F. 2d 511 (2d Cir. 1953).

In any case, even if this conversation had assumed the dignity of an enforceable contract, plaintiff's own testimony makes it clear that he *was* in fact given "credit" with Jenkins, under both the 1920 and 1932 plans, for his 13 years of service with Crane! How can he now complain? If he had remained with the company, had remained under the coverage of the 1920 plan, and had been an employee at age 60, he would have been entitled indisputably to a pension in 1950. Actually, in 1932, he elected to transfer to the 1932 plan. Again, if he had remained with the company and

had been an employee at age 65, he would have been entitled indisputably to a pension in 1950.

However, plaintiff was *not* in the employ of Jenkins at age 65—he was discharged at age 55. He then received everything to which he was entitled under the 1932 plan.

Therefore, on the facts testified to by plaintiff himself, he was not entitled to relief. The jury could not have properly proceeded to find a verdict for plaintiff and the trial judge properly dismissed the action under Rule 41(b).

IV

THERE IS NO FEDERAL QUESTION, AND THE CASE IS NOT OF SUCH GENERAL IMPORTANCE AS TO WARRANT A SUPREME COURT DETERMINATION.

In short, we have here a case involving a rather unusual set of facts—a claim for a life pension based on an oral agreement some 30 years earlier, with a corporate president now dead—in which there is no scintilla of a real federal question. There is no important question of law, either general or federal, which justifies a further review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: Stamford, Connecticut, October 27, 1959

Respectfully submitted,

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